FILE COPY

FILED
AUG 23

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

No. 234

THE UNITED STATES OF AMERICA, EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
*Petitioners,*

*vs.*

INTERSTATE COMMERCE COMMISSION; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; AND MISSOURI PACIFIC RAILROAD COMPANY,
*Respondents.*

**BRIEF OF RESPONDENTS, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; AND MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.**

CHARLES H. WOODS,
E. A. BOYD,
1211 Railway Exchange Bldg.,
Chicago, Illinois.
BRUCE SCOTT,
WALTER McFARLAND,
547 W. Jackson Blvd.,
Chicago, Illinois.
W. F. DICKINSON,
W. F. PETER,
La Salle Street Station,
Chicago, Illinois.
J. M. SOUBY,
1416 Dodge Street,
Omaha, Nebraska.
FRANCIS W. CLEMENTS,
Washington Building,
Washington, D. C.
H. H. LARIMORE,
Missouri Pacific Bldg.,
St. Louis, Missouri,
*Attorneys for Respondents.*

## INDEX.


PAGE NO.

The Legal Questions Discussed in This Brief..... 1

General Statement ..... 3

The Missouri-Kansas-Texas Railroad Company Status ..... 5

Argument ..... 8

1. The Construction of the Law by the Commission, Which Is Charged With the Duty of Administration of Such Law, in a Case of Grave Doubt, Can Not Be Controlled and Reviewed Through an Action in Mandamus. 8
2. The Commission Correctly Construed the Law as Applicable to the Case Made by Petitioners ..... 12

A. The Power in the Commission Sought by Petitioners Is Not Granted by Specific Statutory Enactment ..... 14

B. The Relief Sought by Petitioners Before the Commission ..... 18

C. The Power in the Commission Sought by Petitioners Can Not be Imported into the Act by Necessary Implication ..... 30

D. Carriers Must not Unduly Prejudice any Such Connecting Line in the Distribution of Traffic That is not Specifically Routed by the Shipper ..... 32

E. The Construction of the Statute by the Interstate Commerce Commission Should be Adhered to ..... 32

Conclusion ..... 33

## Table of Cases Cited.


| | PAGE NO. |
|---|---|
| Adkins v. Children's Hospital, 261 U. S. 545 | 27 |
| Clark v. Southern Ry. Co., 69 Ind. App. 697; 119 N. E. 539 | 31 |
| Elliott v. Empire Natural Gas Co., et al., 123 Kans. 558; 256 Pac. 114 | 31 |
| Hedges v. Dixon County, 150 U. S. 182 | 25 |
| Hunt v. Rhodes, 1 Pet. 1 (26 U. S. 1) | 18 |
| Interstate Commerce Commission v. United States ex rel. Los Angeles, 280 U. S. 52 | 21 |
| Interstate Commerce Commission, et al. v. Oregon-Washington Railroad & Navigation Co., et al., 288 U. S. 14 | 22 |
| Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., et al., 76 Fed. 183 | 25 |
| Interstate Commerce Commission v. Humboldt Steamship Co., 224 U. S. 474 | 10, 11, 12 |
| Interstate Commerce Commission v. United States, 289 U. S. 385 | 10 |
| Missouri, Kansas & Tex. Railway Co. v. Oklahoma, 271 U. S. 303 | 27 |
| Missouri-Kansas-Texas R. R. Co. v. Kansas City Terminal Ry. Co., 104 I. C. C. 203 | 2 |
| Russell v. Sebastian, 233 U. S. 195 | 28 |
| Shields v. Barrow, 17 How. 130 (58 U. S. 137) | 26 |
| State of Texas v. Eastern Texas R. R. Co., et al., 258 U. S. 204 | 29 |
| St. Louis, Kansas City and Colorado R. R. Co. v. Wabash R. R. Co., et al., 217 U. S. 247 | 27 |
| United States v. Delaware and Hudson Co., 213 U. S. 366 | 30 |
| United States of America ex rel. Chicago Great Western R. R. Co., et al. v. Interstate Commerce Commission, et al., 71 Fed. (2d) 336 | 12 |
| United States ex rel. Louisville Cement Company v. Interstate Commerce Commission, 246 U. S. 638 | 11, 12 |
| Wilbur v. United States, 281 U. S. 206 | 8 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

No. 234.

THE UNITED STATES OF AMERICA *ex rel.* CHICAGO GREAT WESTERN RAILROAD COMPANY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

*Petitioners,*

*vs.*

INTERSTATE COMMERCE COMMISSION; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; AND MISSOURI PACIFIC RAILROAD COMPANY,

*Respondents.*

## BRIEF OF RESPONDENTS, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; AND MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

### The Legal Questions Discussed in This Brief.

*First.* Can the construction of a law by the Commission, which is charged with the duty of administration of such

law, in a case of grave doubt, be controlled and reviewed through an action in mandamus?

*Second.* Did the Commission correctly construe the law as applicable to the case made by Petitioners?

The court proceedings which followed the action of the Commission in which decisions have been rendered and which decisions are sought by petitioners to be reviewed by this Court have for their purpose the determination of these two questions.

If the answer to the first question is in the negative, it follows that writ of certiorari will be denied. This for the reason that the decision of the Supreme Court of the District of Columbia denying the writ of mandamus, which decision was affirmed by the Court of Appeals, was right and will not be disturbed.

If the answer to the second question is in the affirmative, the writ of certiorari will be denied by this Court because there is no occasion to review a correct construction of the law by the Commission, which construction has been approved by the Court of Appeals, and as against which there are no conflicting decisions.

By motion to dismiss the intervening petitions of the petitioners filed before the Commission in the case of *Missouri-Kansas-Texas R. R. Co.* v. *Kansas City Terminal Ry. Co.*, 104 I. C. C. 203, an issue of law was joined involving the power and authority of the Commission to grant the relief sought by petitioners. In deciding the motion, it was necessary for the Commission to examine and construe the law which creates and defines its powers. After an opportunity to be heard had been afforded to all parties and after argument of counsel for and against the motion, the Commission construed the law as not conferring upon it power and authority to grant the relief sought. Having so construed the law, it dismissed the intervening petitions.

## GENERAL STATEMENT.

Only such facts will be stated herein as to enable the Court to comprehend the case as presented to the Interstate Commerce Commission (hereinafter sometimes called the Commission).

On and prior to January 12, 1909, twelve railroad companies which operated lines of railroad entering into and/or passing through Kansas City, Missouri-Kansas, owned severally or jointly, as the case may be, the stations, yards, and terminal facilities necessary or convenient for the transaction of their respective railroad business. On and subsequent to that date, these twelve railroads decided to combine and enlarge these facilities and to construct the necessary buildings, tracks, bridges, union station, and extensive freight terminals, and to do all things necessary or convenient to the accomplishment of the enterprise. This was accomplished through the instrumentality of the Kansas City Terminal Railway Company, a corporation (hereinafter sometimes called the Terminal Company). Conveyances of property were made by the respective carrier owners to the Terminal Company. Additional lands were acquired, street vacations secured, overpasses and underpasses constructed, union station building erected, and necessary capital was acquired through the issuance of stock and bonds and the execution of deeds of trust. The project became in due course an accomplished fact. By the various instruments shown in the transcript of record in this case, the rights, privileges, and obligations of the twelve railroad companies and all parties signatory thereto are prescribed and defined. The twelve railroad companies which are signers of the various instruments will be referred to herein as proprietary companies. The various agreements will be called herein contracts. The contracts

provided (through distribution of Terminal Company stock) for equal ownership, equal control, equal voice in the management, equal vote as to expenditures on betterments and extension, equal privileges, and equal non-discriminatory use of the property and appurtenances as between the proprietary companies. The contracts provided for the admission of other railroads which might apply for the use of the property and facilities. Each proprietary company had an equal voice and vote in the matter of admittance of other railroads. Any other railroad could be admitted upon written consent of two-thirds of the proprietary companies. Upon admission of any other railroad, such railroad company would have equal rights and privileges and equal obligations with the proprietary companies. All money obligations of the Terminal Company necessary to be paid in order to protect the title to the consolidated property against hazard of seizure or foreclosure is to be paid in equal parts by the proprietary companies. Such obligations included principal of bonds at maturity, interest on bonds at accrual date, and taxes on the property on the due date. Upon such obligations, so payable by the proprietary companies in equal parts to protect title of the consolidated properties, there is to be credited in equal parts the net earnings of the Terminal Company from rentals, privileges, and operations during the accounting period. In order to assure the marketing of the bonds at the best terms possible, the stock of the Terminal Company owned by each proprietary company in equal number of shares (except directors' qualifying shares) was deposited with the trustee as an assurance of equal control by the proprietary companies, the operating agreement was deposited with a trustee, and a deed of trust or mortgage placing a lien upon the property was executed. In order to enhance the market value of the bonds and further to protect the title to the property, it was agreed that if any proprietary company should default in the payment of

its share of the taxes, principal, or interest on the bonds, such defaulted sum should be paid by the non-defaulting companies in equal parts. The hazard to the title in the property of the Terminal Company and, collaterally, the title in common of the proprietary companies, was thereby reduced to the minimum.

All other expenses, such as expenses for maintenance of way and structures, maintenance of equipment, transportation expenses, and general expenses, such as salaries and wages of employes, are paid by the proprietary companies on a wheelage or user basis. Principal and interest on short-term notes for money borrowed by the Terminal Company necessary to meet current operating expenses or for other purposes are also divided among the proprietary companies on a wheelage or user basis.

**The Missouri-Kansas-Texas Railroad Company Status.**

The Missouri, Kansas *and* Texas *Railway* Company was a party to all of the matters and things mentioned above under the heading "General Statement." That company signed all the instruments shown in the record effecting the creation, organization, management, and operation of the Terminal Company. On or about September 27, 1915, a creditors' bill was filed in Court against the Missouri, Kansas and Texas Railway Company and a receiver was appointed. Later the Central Trust Company of New York, as trustee under a deed of trust or mortgage, brought an action of foreclosure and for the appointment of a receiver. The two cases were consolidated and a receiver appointed (294 Fed. 32). In due course a decree of foreclosure and order of sale was entered. The decree of sale, among other things, provided that the purchaser at the sale should have the privilege, within a year from the date of delivery of deeds and taking possession of the properties, of electing to adopt or reject any executory contracts to which the old

company was a party. It was also provided that no mere conduct or user of the rights within that period was to conclude the purchaser in respect of such election (Rec., 117). The purchaser at the sale caused to be organized a corporation under the name of Missouri-Kansas-Texas Railroad Company to take over and operate the property purchased. Within the time fixed by the decree, the Missouri-Kansas-Texas Railroad Company filed its election not to adopt the agreement of the Missouri, Kansas and Texas Railway Company (Rec., 118). The Missouri-Kansas-Texas Railroad Company, being without facilities at Kansas City, petitioned the Interstate Commerce Commission for an order pursuant to the provisions of Paragraph (4) of Section 3 of the Interstate Commerce Act to accord petitioner the right to use designated portions of the union passenger and freight terminals at Kansas City, Missouri-Kansas. Pending final disposition of the case and to meet the emergency, a temporary order was issued pursuant to Paragraph (15) (c) of Section 1 of the Interstate Commerce Act (Rec., 95-96). This case was given a Commission docket No. 15682. The Missouri, Kansas and Texas Railway Company, on account of the elimination of its interest by foreclosure, took no part in the case. The eleven remaining proprietary companies filed intervening petitions before the Commission and, in so far as they chose to do so, participated in the proceeding. The Atchison, Topeka and Santa Fe Railway Company, The Chicago, Burlington & Quincy Railroad Company, The Chicago, Rock Island and Pacific Railway Company, the Missouri Pacific Railroad Company, and the Union Pacific Railroad Company intervened in the case in opposition to the relief sought by the petitioner. The other proprietary companies intervened in the case. Some of the interveners sought to obtain the same relief as to terms that was sought by the petitioner. The petitioners in this case were among the

interveners seeking the same relief as that which was sought by the Missouri-Kansas-Texas Railroad Company. (Rec., 97-98.) The Commission, having determined that it could not grant the relief sought by petitioners, dismissed their petitions. (Rec., 117.) Since this case was lodged in the Supreme Court of the District of Columbia, the Commission, under date of November 13, 1933, has made and entered its final report and order in the case of Missouri-Kansas-Texas Railroad Company *vs.* Kansas City Terminal Railway Company. Under the terms of that final order the Missouri-Kansas-Texas Railroad Company is to pay certain compensation computed upon the allocated property upon a unit basis and operating expenses upon a wheelage or user basis.

## ARGUMENT.

### 1. The Construction of the Law by the Commission, Which Is Charged With the Duty of Administration of Such Law, in a Case of Grave Doubt, Can Not Be Controlled and Reviewed Through an Action in Mandamus.

The Interstate Commerce Act does not provide in clear and unmistakable language for the exercise of the power sought. In order to determine the statutory existence or non-existence of the power, it was necessary for the Commission to resort to a construction of the law. There is no occasion for construction where the language of a statute plainly declares the legislative intent. The fact that construction was resorted to in this case is evidence that there was grave doubt as to legislative intent. The construction of a statute by the department charged with its administration calls for the exercise of judgment and discretion. The performance of these judicial functions is not subject to control by mandamus.

The case at bar is controlled by the doctrine established by this Court in the case of *Wilbur* v. *United States,* 281 U. S. 206. The question in the *Wilbur* case was whether certain funds resulting from the sale of Indian lands were tribal funds or trust funds. If tribal funds, the proceeds thereof were distributable among the enrolled members of the tribe who maintained their tribal status. If trust funds, the proceeds were distributable among the owners in common of the property sold, and their offspring. The Secretary of the Interior was charged with the duty of the administration of the law and of determining who should be enrolled as distributees. One secretary held the fund to be a trust fund and caused to be enrolled certain children of an Indian mother who had lost or abandoned her tribal

status, and permitted such children to participate in the yearly distribution of the proceeds. Secretary Wilbur, coming into office later, held the funds to be tribal funds and caused the names of these children to be stricken from the rolls because of the absence of tribal status. These were two directly opposite constructions of the same law. By the first construction, rights in property were declared. By the second construction, the same property rights were denied. An action in mandamus was instituted to require the Secretary to re-enroll these children on the ground that he had no power to change the ruling of his predecessor in office whereby rights had been declared and upon the further ground that he had misconstrued the applicable law. Mandamus was denied by the trial court and, on appeal, allowed by the Court of Appeals. This Court reversed the decision of the Court of Appeals and affirmed the decision of the trial court. This Court, speaking through Mr. Justice Vandevanter, said (218, 220):

> "• • • Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."
>
> "'• • • Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded.'"

In the case at bar no prescription of law equivalent to a positive command requiring the Commission to act in the premises can be found. Its power or lack of power to act must be determined by the exercise of judgment and discretion in the construction of the applicable law. Freedom

from doubt is absent. There exists grave doubt. Such construction, right or wrong, can not be controlled by mandamus.

In the case of *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, denial of mandamus was approved by this Court upon the following state of facts. A shipper filed a complaint with the Commission alleging the collection of rates which were prejudicial to complainant and preferential of competitors in violation of Section 3 and seeking damages alleged to have resulted from such violation. The Commission found prejudice and preference to exist and ordered a removal thereof. It further found that "the record will not support an award of reparation based upon the undue prejudice found to exist." Action in mandamus was brought in the Supreme Court of the District of Columbia on the ground that the Commission had committed an error of law. The writ was denied by the trial court. The Court of Appeals reversed the trial court and held that the writ should issue. This Court reversed the decision of the Court of Appeals and sustained the decision of the trial court. This Court, speaking through Mr. Justice Cardozo, said (393):

> "* * * Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact."

In the case at bar, the Commission, being unable to find any prescription of law free from doubt and equivalent to a positive command, was under the necessity of construing the law which it was created to administer. Construction of the law is a judicial function requiring the exercise of judgment and discretion. Error in the exercise of such a function can not be controlled by mandamus.

The case of *Interstate Commerce Commission* v. *Humboldt Steamship Company*, 224 U. S. 474, cited by petition-

ers, is not contrary to or inconsistent with the cases above cited. The ultimate question in the *Humboldt* case was whether Alaska is a territory of the United States within the meaning of the Interstate Commerce Act, as amended. The Commission held Alaska was not such a territory and, therefore, that the powers granted to the Commission could not be exercised in a case alleging violation of the Act by an Alaskan railroad. If Alaska be such a territory, the Act specifically authorized the Commission, upon a proper record, to exercise the powers which the complainants had sought. The Court found that the Commission's ruling was contrary to a long line of decisions of this Court defining the territorial status of Alaska. This Court, having already construed the law, it was the duty of the Commission to apply the law as construed. Where this Court, by interpretation of the law, has removed the doubt and uncertainty, there is no occasion for commission construction. The Court therefore granted the writ requiring the Commission to take jurisdiction. The question in the *Humboldt* case was not lack of prescribed power, but the territorial scope within which the clearly defined power could be exercised.

In the case at bar the question before the Commission was whether or not the power sought to be exercised could be found in the law. It exercised a judicial function in construing the law and found no such power prescribed therein.

The case of *United States, ex rel. Louisville Cement Company* v. *Interstate Commerce Commission*, 246 U. S. 638, cited by petitioners, is in line with the decision in the *Humboldt* case. The *Cement* case arose prior to the Transportation Act of 1920. The law then in effect provided that complaints for damages shall be filed with the Commission "within two years from the time the cause of action accrued and not after." This Court has held that this provision is

not merely a statute of limitations but is jurisdictional. The only matter of doubt that could or did arise in the *Cement* case was as to when the cause of action accrued. The complaint was filed more than two years after delivery of the shipments but within two years of the payment of the charges claimed to be illegal. The Commission construed the time of accrual of the cause of action to be the date of delivery of the shipments. Prior to the time this case reached the courts, this Court had judicially construed this statute, defining the accrual of the cause of action to mean the date of payment of the charges found illegal. This Court had therefore removed the doubt and had taken away the necessity for a construction of the statute by the Commission. The statute having been construed by this Court and the doubt being removed and the Commission's duty under the law having been made clear, its future action in the premises became ministerial in character and was therefore subject to be controlled by mandamus.

The case at bar is so far removed from any similarity to the *Cement* case or to the *Humboldt* case that these cases are not helpful.

**2. The Commission Correctly Construed the Law as Applicable to the Case Made by Petitioners.**

The construction of the law by the Commission was approved by the Court of Appeals in the following language (71 Fed. (2d) 336, 340):

> "• • • But appellants tell us that the statute is broad enough and that, in the view they are entitled to take, the refusal of the Commission to grant the relief is not grounded on a misinterpretation of the statute, but is in every respect a denial of jurisdiction. In support of this they quote from the opinion certain statements to the effect that 'the power and authority thus invoked are not conferred by the quoted paragraph (the statute),' and again, 'we are unable to find the

requisite power or authority in any other provision of the act,' and 'we are unable to spell out from that provision such a jurisdiction.' These statements they say indicate the view of the Commission that it was without jurisdiction. But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask. The Commission is an administrative body and can exercise only the powers delegated to it by Congress, but in the application and interpretation of the powers conferred it exercises judgment and discretion, and it was clearly in the exercise of these that it used the language in the quoted sentences above. If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion. And we may remark in passing that, to justify the Commission in the exercise of such authority as is asked, the right to do so should be expressed in clear and certain language. Congress has conferred on the Commission broad powers for the purpose of avoiding discriminations, preferences, and inequalities, and has likewise given it power to regulate the interchange of traffic and the distribution of cars, to revise extortionate exactions under trackage agreements, to enforce the use by one carrier of the terminal facilities of another, and indeed to take all necessary steps to maintain an adequate railway service, but it is going too far to say that all or any of these powers themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist. The case is, of course, different if the contract either then or subsequently violates a specific law of the United States. Cf. *Louisville & N. R. R.* v. *Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671. In cases in which it does not, it may well be that only the most pressing public necessity would justify the Congress in delegating to an administrative body jurisdiction to destroy a valid contract and substitute another of its own making, and the Commission would not be justified in assuming

Congress had done so except when authority was clear, for the inviolability of contracts is a cardinal principle of our business and social life. The states are forbidden to pass any law impairing them, and as far back as the ordinances for the government of the Northwest Territory it was stated as a primary principle that, in the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force, that shall in any manner whatever interfere with or affect private contracts or engagements bona fide, without fraud, previously made. This is no more than the recognition of a fundamental principle, as true now as then, that contracts, as vesting rights of property, ought to be protected from interfering legislation."

A. The Power in the Commission Sought by Petitioners is Not Granted by Specific Statutory Enactment.

The Interstate Commerce Commission was created by statute and can only exercise such powers as were delegated to it by the law which created it, or which are delegated to it by acts amendatory thereto.

The Interstate Commerce Act by appropriate provisions has specifically provided the circumstances and conditions under which the Commission may determine the joint or common use of the terminals of one carrier or carriers by another carrier or carriers. The first of these povisions is found in Paragraph (15) of Section 1. It reads in part as follows:

"(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may

> determine: * * * (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; * * *."

The Commission found that the Missouri-Kansas-Texas Railroad Company was without adequate terminal facilities at Kansas City; that it was using the terminals as a tenant at will without contract or agreement; and that there was a failure to agree as to terms as between the owners of the terminals and the petitioner. It issued its service order requiring the owners to permit the use under terms and conditions mentioned in the order until a hearing could be had and the terms and conditions of such use could be fixed by the Commission.

There is and can be no contention by the petitioners that they come within the terms of this statute. They were at the time of the intervention and still are (through stock ownership) the joint and common owners and users of the very terminals in question. The terms and conditions of the ownership and use of the terminals had long since been agreed upon under contracts duly executed by the petitioners. There existed no emergency calling for the action of the Commission. In fact, no emergency is claimed.

The second provision of the Interstate Commerce Act is found in Paragraph (4) of Section 3, which reads as follows:

> "(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use

of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

The conditions precedent to the exercise of the power conferred by this section are three. *First,* there must exist a terminal owned or controlled by a carrier or carriers which is more than adequate to the substantial handling of the owning carriers' business. *Second,* the applicant for use must be "another carrier or other carriers." These words, "another carrier or other carriers," can have no meaning in the statute except as they apply to a carrier or carriers which have no ownership and which are not entitled to the enjoyment of the terminal facilities involved. *Third,* there must be a failure to agree upon the terms and conditions of use.

The petitioners do not meet these conditions precedent to action on the part of the Commission. That the terminals are adequate to meet the requirements of the pro-

prietary lines is not disputed. The Commission has found that they are also adequate to meet the additional requirements of the Missouri-Kansas-Texas Railroad Company, a non-proprietary line. The petitioners are not "another carrier or other carriers" in the meaning of the statute. They are the joint owners and are perpetually entitled to the joint use of the very terminals involved. The terms and conditions of the joint ownership and use have been reduced to writing in contract form and have been duly executed and solemnly acknowledged by petitioners.

Concerning the relationship of the petitioners to the project, which was consummated by the contracts, the Commission says:

> "While the Great Western appears to have been invited to join in the project, the Kansas City Southern early and peremptorily demanded admission." (Rec., 110.)

The very contract itself provides that there shall be no discrimination as between the proprietary companies as to the full and unlimited use and enjoyment of the terminal property and its facilities. Petitioners make no charge of any violation of the terms of the contract. If they did, an action for damages would lie in a court of law and not before the Commission. They do not charge that the execution of the contract was procured by misrepresentation or fraud on anybody's part, nor do they charge that the contract as written and executed does not fully express the agreement of the parties. If they did, action to rescind or reform the contract, as the case might be, would lie within the powers of a court of equity and not with the Commission. The Commission is not given equity powers by the Interstate Commerce Act. It certainly has not been given powers broader than those of a court of equity.

"• • • Equity may compel parties to perform

their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same."

*Hunt* v. *Rhodes, et al.*, 1 Pet. 1, 14 (26 U. S. 1, 12).

B. The Relief Sought by Petitioners Before the Commission.

Petitioners seek to have the Interstate Commerce Commission by order compel the use of terminals which are already jointly owned by them and the other proprietary companies under terms and conditions different from those provided in the contracts. They seek to have the Commission by order rule that the contracts are not binding as to them. Such an order would not relieve the other parties to the contracts of their contract obligations. Stated in another way, the petitioners seek to have the Commission by order authorize partial default in payment of obligations which the parties have jointly and severally agreed to pay. Petitioners frankly admit the consequences of such an order as applied to the year 1932 and as disclosed by Exhibit 2 (Rec., 84).

The correctness of Exhibit 2 is denied in the answer of the Terminal Company. It is referred to herein as illustrative of the consequences if petitioners' contention could be sustained.

Each of the lines using the terminal under the contract agreed to pay bond interest in the sum of $165,821.03, less credits from operation to which each is entitled in equal shares. They each agreed to pay taxes in the amount of $40,661.33. Petitioners seek an order of the Commission which would affect the obligations of the parties to the same effect as if the contract were to read in such a manner that the Santa Fe instead of agreeing to pay $206,482.36

to cover its equal share of the bond interest and taxes would pay $599,665.32. By the same token, the Chicago Great Western, instead of paying as it did under the contract $206,482.35, would pay as though the contract provided for payment of $60,057.57 or, in other words, $130,779.39 less than the contract obligations which it had assumed. Similar changes would result as to the other proprietary companies.

Exhibit 2 (Rec., 84), as is well known to petitioners, does not present the true picture and is misleading. The interest on bonds amounted to $1,989,852.22 and was charged to each of the twelve lines in equal shares upon a unit basis. The credit from income of the Terminal Company, amounting to $176,731.67, was allocated to each of the twelve companies equally on a unit basis. The taxes on the property were also divided among the twelve companies equally on a unit basis. The operating expenses amounted to $1,789,572.71, and the interest on other indebtedness, amounting to $41,368.75, was divided among the twelve companies on a wheelage or user basis. The net result was that for the year 1932, the twelve companies paid a total sum of $4,090,537.67. This sum was paid by the respective companies as per the following table:

| | | Per Cent |
|---|---|---|
| A., T. & S. F. | $ 665,407.74 | 16.27 |
| Alton | 278,947.27 | 6.81 |
| C., B. & Q. | 345,781.79 | 8.45 |
| C. G. W. | 236,137.60 | 5.77 |
| C., M., St. P. & P. | 236,596.61 | 5.78 |
| C., R. I. & P. | 507,817.15 | 12.42 |
| K. C. S. | 229,362.11 | 5.61 |
| M-K-T | 263,634.81 | 6.45 |
| M. P. | 495,269.48 | 12.11 |
| St. L.-S. F. | 258,961.58 | 6.33 |
| U. P. | 309,195.17 | 7.56 |
| Wabash | 263,426.36 | 6.44 |
| | $4,090,537.67 | 100.00 |

The figures shown as to operating expenses and interest on other indebtedness are not shown in Exhibit 2, but such items are known to petitioners and we anticipate will not be disputed.

The contract provides that in event of default in payment of the allottable proportion of interest and taxes by any company, the non-defaulting companies will pay not only their allottable share but also, in equal parts, the share of the defaulting company (Rec., 66). Immediately upon the happening of such events, it is made the duty of the trustee under the stock trust agreement to demand and enforce payment by the defaulting company for the use and benefit of the paying companies (Rec., 142). If the Commission were to make the order as sought by the petitioners, such an order would be tantamount to an authority to petitioners to default in a contractual obligation. Upon such default, the trustee would be bound under the stock trust agreement to attempt to enforce the payment of such defaulted sum against the petitioners. In such an action the petitioners would no doubt attempt to plead the order as a defense. It can therefore be seen that by such an order as is sought by the petitioners not only would the operating agreement be abrogated but all of the agreements incident to and connected with the project would be abrogated. The entire structure upon the good faith of which the capital was subscribed and paid, the bonds marketed and sold, and the credit established will have collapsed. Such chaos and uncertainty would ensue as to cause bond values to tumble. The holders of such bonds would suffer the hazard of the possibility of orders from time to time issued by the Commission. If the Commission had power to make such an order as is sought by petitioners, it would likewise have the power to abrogate and modify such orders and to make other and different orders from time to time. Investments are not made and money

is not loaned upon any such hazards. The owners of these bonds are a component part of the public whose rights and interests are entitled to be considered and conserved. Under such an order or orders, the credit of the Terminal Company, built upon the very foundation of the various agreements, would be destroyed.

If the Commission can be held to have the power to grant the relief sought by the petitioners, then it must be held to have the power to grant the same relief to each of the proprietary companies. The petitioners seek to have the contracts abrogated and disregarded. They seek to have the Commission allot to them a joint use (not of all of the terminal facilities which they now enjoy in common with the other proprietors) of selected portions of such terminals upon terms other than those agreed to by contract. If each of the other companies sought and secured the same exercise of power, there would result not a unified terminal so valuable to the public but a loosely connected assemblage of terminals. Some of the parts might be used by one line, other parts by two lines, other parts by many lines, and still other parts by all lines, and still other parts by no line. Such action would result in an ill-defined hodgepodge. The public service and convenience, which was the underlying motive to the unification, would be thrown into the discard. It must not be overlooked that this vast terminal, created at great cost at public demand, by the voluntary action of the proprietary companies, can not be unscrambled and the parties placed in their respective positions occupied prior to the execution of the contracts. This is physically and legally impossible.

In the case of *Interstate Commerce Commission* v. *United States ex rel. Los Angeles,* 280 U. S. 52, in interpreting the power of the Interstate Commerce Commission under Paragraphs (18) to (21) of Section 1, the Supreme Court held that the Interstate Commerce Commission had

no power to compel railway carriers to abandon existing stations and terminals and to erect new ones in lieu thereof. The Court says, at Page 70:

> "When the interest of a great city in its improvements is to be promoted entirely at the expense of railroads that enter it, Congress would be expected to hesitate before it would change discretionary leave for the erection of such stations into positive command. In such a case the expenditure of a large amount of capital will not bring with it corresponding increase in the railroad revenues. If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act."

In the case of *Interstate Commerce Commission, et al. v. Oregon-Washington Railroad & Navigation Co., et al.*, 288 U. S. 14, the Court had before it the interpretation of Paragraph (21) of Section 1 of the Interstate Commerce Act. The pertinent part of that paragraph reads:

> "(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

In that case the Commission maintained that if it is found that the conditions stated in the proviso exist, the power given to compel a carrier "to extend its line or

lines" is unlimited and the way is open for an order to extend for any distance, at any cost, for the purpose of developing virgin territory or for supplying competition in a region served by other carriers. The Court says (35):

> "The phrase 'and to extend its line or lines' is part of a single sentence committing to the Commission the power to require carriers to provide safe and adequate facilities for car service as defined in the act. The reasonable conclusion is, therefore, that the extensions mentioned have to do with car service, and are not intended to create a wholly independent subject of jurisdiction. In the proviso the furnishing of facilities and extension of lines are blended as belonging in a single class. We should expect, if Congress were intending to grant to the Commission a new and drastic power to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, the intention would be expressed in more than a clause in a sentence dealing with car service."

The Supreme Court has decided that the Commission is without power by order to compel the union of terminals and the construction of a union passenger depot by the carriers. The position of the petitioners is that after the carriers have voluntarily united the terminals and have constructed the union station and have voluntarily executed all of the agreements necessary or convenient to the accomplishment of the non-compellable enterprise, a power is thereby created in the Commission by order to compel dealings between the parties which it could not have compelled at the beginning. The purport of this contention is that the power in the Commission is created not by act of Congress but by the voluntary act of the carriers. This contention is contrary to the well-known rule that that which is forbidden to be done by direct action can not be accomplished lawfully by indirection. As the Commission did not have the power to compel the action taken by the carriers, their voluntary act could not create the power.

Jurisdiction of the subject matter not granted by law can not be conferred by voluntary act of the parties.

Another situation which would result from an order of the Commission upon the basis sought by petitioners is worthy of note. If the assumption of principal on bonds is to be changed from a unit basis (as per the contract) to a user basis by order of the Commission, the capital investment of each proprietary company would be taken entirely out of the hands of the management of such company and placed under the uncertainty of the caprice of others over whose action the investing company has no control. No doubt the managing officers of petitioners have a right to determine for themselves what is or is not a prudent investment for their respective companies. The law would have to be very specific in its terms before it could be held that petitioners have the right, through the device of a Commission order, to determine the investment which the Santa Fe shall make in terminal properties. Such far-reaching powers would certainly not be left to implication or analogy but would be stated by the Congress in very clear and unmistakable language in the Interstate Commerce Act.

Measure of ownership is controlled by measure of investment. Measure of control usually and customarily as a matter of right follows the measure of ownership. If the measure of investment and ownership were placed upon a user basis, the voting power of each proprietary company would change from time to time to the extent that any line might elect from month to month to increase or decrease its use of the terminal. We can find no section of the Interstate Commerce Act which either directly or by implication could be held to grant to the Interstate Commerce Commission jurisdiction to enter an order or orders which would have such far-reaching and drastic

effect and which would affect the interests of a multitude of people who are not before the Commission.

Clearly, the petitioners are not within the terms of Paragraph (15) (c) of Section 1 and are not within the terms of Paragraph (4) of Section 3 of the Interstate Commerce Act.

The petitioners are in effect contending that contracts lawful when made have become void and inoperative as to them by reason of a change in the law. If the contracts have become void by operation of law, they are void as to all parties. They can not be valid as to some of the parties to the contract and invalid as to others in the absence of incompetency at the date of execution. The validity of contracts is a judicial question subject to determination by the courts. It is not an administrative question to be determined by the Commission.

In the case of *Hedges* v. *Dixon County*, 150 U. S. 182, 192, the Court says:

> "Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake to so modify it as to make it legal and then enforce it."

In the case of *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. Ry. Co., et al.*, 76 Fed. 183, 184, the Court, in speaking of the powers conferred upon the Commission says:

> "• • • The interstate commerce commission is not invested, and cannot be invested, under the constitution, with either legislative power or purely judicial power. Its functions are necessarily restricted to the performance of administrative duties, with such quasi judicial powers as are incidental and necessary to the proper performance of those duties. • • • The right claimed is not an incidental right. It is not a right or power to be derived by implication or by construction from general phrases in the first or other

> sections of the act, nor can it be imported into the act by reference to or by reason of the necessities of the case. If found at all, it must be found in express and specific language, among the powers and rights granted in direct terms, and there is no such language in the act."

Petitioners seek to have the Commission declare the contracts void as to them, rewrite the contracts, and then by order enforce the contracts as rewritten. This a court of equity could not do. No such power is conferred on the Commission in "express and specific language."

The petitioners seek to have the contracts rewritten by the Commission so as to place them in what they imply would be an equitable position. Such action by the Commission would affect the rights and interests of parties not before the Commission and who can not be compelled to have their rights adjudicated by the Commission. The trustee under the deed of trust and the bondholders are under no legal compulsion to permit an adjudication of their rights by the Commission. The order sought by petitioners would change the duties of the trustee and modify the security of the bonds.

In the case of *Shields* v. *Barrow*, 17 How. 130, 142, 58 U. S. 137, 150, the court says:

> "* * * it being clear that the circuit court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons, and that the original bill ought to have been dismissed."

The right of proprietary companies (including petitioners) to make the contracts and their legality when made is not in dispute. The petitioners' contention is that there is no such present right, the right having been destroyed not by direct and express enactment but by implications of law.

In the case of *Adkins* v. *Children's Hospital*, 261 U. S. 545, 546, the Court says:

> "* * * That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause (Fifth Amendment to the United States Constitution), is settled by the decisions of this Court and is no longer open to question."
>
> "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

See also *Missouri, Kansas & Tex. Railway Co.* v. *Oklahoma*, 271 U. S. 303.

It is worthy of note that the operating agreement, which is the real subject of attack by petitioners, is by its terms in line with the terms of a user contract decreed by the Supreme Court in the case of *St. Louis, Kansas City and Colorado R. R. Co.* v. *Wabash R. R. Co., et al.*, 217 U. S. 247, 254. The Wabash owned right of way, tracks, and terminal facilities in St. Louis. In the foreclosure proceedings against the Wabash, the St. Louis, Kansas City and Colorado railroad was decreed the right to a joint use of these tracks, terminals, etc. The value of the property was established. It was decreed that interest on this value and expense of keeping up the track should be paid on a wheelage or user basis. This decree was affirmed by the Court of Appeals, with a dissenting opinion by Judge Hook. The decree was reversed by the Supreme Court and the dissenting opinion of Judge Hook was approved and adopted. The language of the Supreme Court is as follows:

> " 'The final matter is that of compensation. In this I think the master erred. He fixed the value of the right of way at a million of dollars; and reported that, in his judgment, the share of the interest on this value

and in the expenses of keeping up the track, which the intervenor company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track, I see no reason to doubt the justice of the rule fixed by the master, but in regard to the interest on the value, I think the intervenor should pay one-half of that, and for these reasons: It is a familiar fact that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufacturing establishments, warehouses and other buildings for the convenient transaction of business between the carrier on the one hand and the manufacturer and the merchant on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, but also shares in the benefit of access to all these manufactories, warehouses, etc. It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of this business, and it may share equally. Under those circumstances, it seems to me no more than fair that a new company, which crowds itself into an equal access to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence I shall sustain the objections of the respondent to the report of the master, so far as concerns the amount of compensation, and I think that the intervenor company must pay one-half the interest on the value and its share of the cost of keeping up the track, determined upon a wheelage basis.'"

It has been held that change of the law and of state constitution may not destroy rights created by contract. In the case of *Russell* v. *Sebastian*, 233 U. S. 195, 204, 210, the Court says:

"* * * That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a

property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court."

"We conclude that the constitutional amendment of 1911, and the municipal ordinances adopted in pursuance thereof, were ineffectual to impair this right, * * *."

Based upon the various agreements shown on the record in the case at bar, large investments have been made in property, in capital stock, and in bonds of the Terminal Company. These investments have created property rights in the investors. To hold that the Commission, at the behest of two of these investors, may abrogate or modify the agreements by reason of which and under the terms of which these investments have been made and these property rights have been created, would raise grave and serious doubts as to the constitutionality of an act held to grant such power. In the case of *State of Texas* v. *Eastern Texas R. R. Co., et al.*, 258 U. S. 204, 217, in interpreting the grant of power to the Commission under Paragraphs (18), (19), and (20) of Section 1 of the Interstate Commerce Act, the Court says:

"If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said, 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'"

In addition to the avoidance of interpretations which create doubtful constitutionality, the Court in determining the grant of power will also consider the far-reaching consequences of the exercise of such power. The interpreta-

tion of Paragraph (8) of Section 1 of the Interstate Commerce Act was before the Court in the case of *United States* v. *Delaware and Hudson Co.*, 213 U. S. 366, 414. This section is commonly known as the commodities clause of the Act. The Supreme Court held in that case that it is the duty of the Court to adopt the construction of a statute, if possible, which saves it constitutionality. The Court further says:

> "* * * And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the Government not well founded."

C. THE POWER IN THE COMMISSION SOUGHT BY PETITIONERS CAN NOT BE IMPORTED INTO THE ACT BY NECESSARY IMPLICATION.

Petitioners, having failed to find the grant of power by clear and specific statutory enactment under Paragraph (4) of Section 3, seek to find the power by implication in Paragraphs (1) and (3) of Section 3.

Paragraph (3) of Section 3 contains one command and two prohibitions:

> 1. Carriers shall, according to their respective powers, afford all reasonable, proper, and equal facilities for interchange of traffic as between themselves and other connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith.

The record shows that this command has been fully complied with by the creation of an impartial Terminal Company, whose duty it is to be a convenient instrument for the facilitating of interchange, receipt, forwarding, and delivery of passengers and property between the proprietary lines.

> 2. Carriers shall not discriminate in their rates, fares, and charges between such connecting lines. The word "rate" as used in the interstate commerce law means the net cost to the shipper of the transportation of his property; it is the net amount the carrier receives from the shipper and retains. *Elliott* v. *Empire Natural Gas Co., et al.*, 123 Kans. 558; 256 Pac. 114, 117.

Section 6 of the Interstate Commerce Act requiring schedules of rates, fares, and charges to be filed with the Interstate Commerce Commission does not require schedules concerning free passes issued by virtue of Paragraph (7) of Section 1 to be filed, since "rate" means the net cost of transportation to the shipper, "fare" means the rate of charge for carriage of passengers, and "charge" means the price fixed or demanded for services rendered so that the act contemplates filing only where compensation is required. *Clark* v. *Southern Ry. Co.*, 69 Ind. App. 697; 119 N. E. 539, 543. There is no claim in the record that any shipper or passenger has had reason to complain as to the rates, fares, and charges collected by reason of the terminal arrangements.

D. Carriers Must Not Unduly Prejudice Any Such Connecting Line in the Distribution of Traffic That Is Not Specifically Routed by the Shipper.

Petitioners make no claim that the operating contracts have resulted in a violation of this clause. Such a charge would have to be based upon the conduct of the party or parties in dealing with specific unrouted shipments.

The power sought to be imported into the Act by implication is not found in the language of Paragraph (3) of Section 3.

Paragraph (1) of Section 3 deals with the relation of carriers to shippers and is not applicable to the relation of carriers to each other.

E. The Construction of the Statute by the Interstate Commerce Commission Should Be Adhered to.

The Interstate Commerce Commission has been charged with the duty of the administration of the Interstate Commerce Act. The Commission, in the first instance in which it has been called upon to construe Paragraph (4) of Section 3, has construed the Act as not conferring upon it the power to grant the relief sought by petitioners. The contemporaneous construction placed upon a statute by the officers or department charged with the duty of executing it is entitled to more or less weight. Such construction should not be disregarded or overturned except for the most cogent reasons and unless such construction is clearly erroneous. This rule is particularly applicable in cases, like the case at bar, in which vested rights are involved. This rule has been so long applied in the National Courts as to have become elementary. It is so well known as to require not citation of authorities.

## Conclusion.

We respectfully submit that certiorari should be denied in this case:

First: Because the construction of the law by the Commission, which is charged with the duty of administration of such law, in a case of grave doubt, can not be controlled and reviewed through an action in mandamus. The Supreme Court of the District of Columbia committed no error in refusing to grant the writ of mandamus, and the Court of Appeals committed no error in affirming the decision of the trial court.

Second: Because the Commission correctly construed the law as applicable to the case made by petitioners. Such construction of the law is correct and was approved by the Court of Appeals of the District of Columbia and there are no decisions of the Commission or of the Courts establishing a contrary or conflicting construction.

Respectfully submitted,

CHARLES H. WOODS,
E. A. BOYD,
1211 Railway Exchange Bldg.,
Chicago, Illinois.
BRUCE SCOTT,
WALTER MCFARLAND,
547 W. Jackson Blvd.,
Chicago, Illinois.
W. F. DICKINSON,
W. F. PETER,
La Salle Street Station,
Chicago, Illinois.
J. M. SOUBY,
1416 Dodge Street,
Omaha, Nebraska.
FRANCIS W. CLEMENTS,
Washington Building,
Washington, D. C.
H. H. LARIMORE,
Missouri Pacific Bldg.,
St. Louis, Missouri.

*Attorneys for Respondents.*